IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

STATE OF OHIO, **Plaintiff,** **vs.** **BOARD OF COUNTY COMMISSIONERS, et. al.,** **Defendants.**	**CASE NO. 97-CV-049** **DECISION** ***Docket: For the reasons stated in the findings of fact and conclusions of law found in this decision, the Holmes County Health Department's & Dr. Maurice Mullet's Motion of 05/27/97 is considered & denied; State is granted leave to file within 14 days of this order an amended complaint substituting Holmes County Health District for the Holmes County Health Department; State's Motion to Strike of 07/31/97 Considered & Denied.***

J/129 P.503-512

There are two motions pending in this case. First, a motion of Defendants Holmes County Health Department and Dr. Maurice Mullet to dismiss the complaint filed on May 27, 1977 and second, the State's motion to strike Defendant's reply to State's response filed on July 31, 1997.

First, in the July 31, 1997 motion to strike, the State correctly cites Local R. 5(C)(2) which generally prohibits rebuttals to memoranda in opposition to motions in this Court.

However, by order of July 24, 1997[1] the Court granted defendants Holmes County Health Department and Dr. Maurice Mullet leave to submit additional authority by July 25, 1997. Accordingly, defendants' rebuttal of July 24, 1997 did not contravene the local rule of practice and the State's motion to strike shall be denied.

Regarding the May 27, 1997 motion to dismiss, the Court has received a June 18, 1997 memorandum in support of the motion filed by the Holmes County

[1] Journal 128, Page 950

Commissioners; a July 10, 1997 response by the State in opposition to the motion to dismiss and the aforementioned Defendants' reply of July 25, 1997.

The motion to dismiss is properly before the Court for decision.

Findings of Fact and Conclusions of Law.

The State of Ohio, by the Attorney General, filed this action against the Holmes County Commissioners (hereafter "Commissioners"), the Holmes County Health Department (hereafter "the "Health Department"), and Dr. Maurice Mullet (hereafter "Dr. Mullet"). The state seeks an injunction and civil penalties from all defendants for violations of Ohio's water pollution laws.[2]

The Commissioners owned seven waste-water treatment plants (hereafter "plants"). The Commissioners received National Pollution Discharge Elimination System Permits (hereafter "permits") for each of the plants from the Ohio Environmental Protection Agency (hereafter "Ohio EPA"). The permits allow the Commissioners to discharge effluent (i.e. waste-water) from the plants to the waters of the state. During much of this time, the Health Department operated the plants under contract with the Commissioners.

The Defendants allegedly violated the terms of the permits and the provisions of O.R.C. Section 6111.04. Specifically, the State alleges that the Defendants failed to comply with the effluent limitation and monitoring requirement set forth in the permits. In addition, the State contends that the Commissioners and the Health Department failed to hire a certified operator, comply with certain construction schedules and failed to operate and maintain the plants according to the terms of the permits.

The State also alleges that the Commissioners and the Health Department failed to obtain required Permits to Install from Ohio EPA . The Commissioners

[2] R.C. Chapter 6111 and Ohio Administrative Code Rules promulgated thereunder.

and the Health Department also allegedly failed to comply with the terms of Permits to Install.

Finally, the State alleges that Dr. Mullet in his "official personal capacity", along with the Commissioners and the Health Department, violated R.G. Chapter 6111 by issuing approvals and permits for unauthorized wastewater disposal systems and violated the state's general water quality criteria.[3]

The motion to dismiss is made pursuant to Civ. R. 12. Civ. R. 12(B) states that "every defense . . . shall be asserted in the responsive pleading . . . except that the following defenses may at the option of the pleader be made by motion . . ." In this case, the Health Department and Dr. Mullet have moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted.[4] A motion to dismiss tests the sufficiency of the pleadings submitted by the parties. The Court must construe the allegations in the complaint to be essentially true and in a light most favorable to the party opposing the motion to dismiss.[5]

On the other hand, in order to survive a motion to dismiss, "the complaint must set forth sufficient information to suggest that there exists some recognized legal theory upon which relief may be granted."[6] A complaint must be dismissed when it fails to allege essential elements to sustain recovery under some viable legal theory.[7] "The purpose of Civ. R. 12(B)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything in the complaint is true."[8]

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[3] Ohio Adm. Code 3745-1-04.
[4] Civ. R. 12(B)(6).
[5] *Slife v. Kundtz Properties, Inc.* (1974), 40 Ohio App. 2d 179, 182; See also, *O'Brien v. University Community Tenants Union* (1974), 42 Ohio App. 2d 242.
[6] *District of Columbia v. Air Florida, Inc.* (1984), 750 F.2d 1077, 1081.
[7] *Vemco, Inc. v. Camardella* (1994), 23 F.3d 129, 132-133; *In Re Delorean Motor Company v. Weitzman* (1993), 991 F.2d 1236, 1240; *Scheid v. Fanny Farmer Candy Shops, Inc.* (1988), 859 F.2d 434, 436.
[8] *Mayer v. Mylod* (1993), 988 F.2d 635, 638.

Accordingly, assuming all factual allegations are true, a motion to dismiss must be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support his claim which entitle him to relief."[9]

The motion to dismiss raises issues which are asserted in four branches.

The first branch argues that the Health Department is not a person or a political subdivision and thus is not an appropriate party to this case.

In the second branch of the motion the Health Department and Dr. Mullet argue that, as they are not permit holders for the plants, they may not be held liable for improper operation of the plants as alleged in Counts 1 through 21 of the Complaint (with the exception of Count 17).

In the third branch of the motion the Health Department and Dr. Mullet argue that the Complaint is barred by the doctrine of sovereign immunity.

In the fourth branch of the motion the Health Department and Dr. Mullet argue that the Complaint is barred by the statute of limitations.

The Court shall discuss its findings in the order in which the branches of the motion are made.

As to the first branch of the motion, it is clear that the appropriate party defendant in this case is not the Holmes County Health Department but the Holmes County General Health District.[10] At the case management conference it was agreed that the State would be granted fourteen days leave from the date of this order to file an amended complaint substituting the Holmes County General Health District as a party defendant in the place of the Holmes County Health Department. In the remainder of this decision, the Court shall rule as if the Holmes County

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[9] *Conley v. Gibson* (1957) 355 U.S. 41, 45.

[10] *State, ex. rel. McCray v. R. J. Mahahan, M. D., Henry County Health Commissioner* (January 6, 1977), Henry App. Case No. 7-76-1, unreported.

General Health District (hereafter "Health District") has already been added as a party defendant and has joined in the motion to dismiss.

In the second branch of the motion, the Health District and Dr. Mullet argue that only a named permit holder may be held liable for violation of a permit. The Court notes that the State has not asserted any claims against Dr. Mullet for violation of the permits issued to the Holmes County plants.[11]

The Legislature's mandate to Ohio EPA in R.C. 6111.04 is the prohibition of pollution being discharged into the waters of the state. R.C. 6111.04 specifically states:

> "No person shall cause pollution or place or cause to be placed any sewage, industrial waste or other waste in a location where they cause pollution of any waters of the state . . ."

The primary mechanism used by Ohio EPA to implement the mandate to prevent pollution to surface waters of the State is to issue a permit. A permit imposes requirements for operation and maintenance of plants. In R.C. 6111.04, the legislature did not require ownership of a permit as the basis for a pollution prosecution. Defendants argue that the additional words "except in such cases where the Director of Environmental Protection has issued a valid and unexpired permit..." limits prosecutions for pollution where a permit has been issued to those persons listed on the permit.

This argument conflicts with the legislative intent to prohibit pollution to the waters of the State and would insulate polluters from liability if there is a permit issued for a plant and the alleged polluter was not listed in the permit.

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[11] The State has asserted claims against Dr. Mullet for violations of R.C. Chapter 6111 that are not related to the permits. Specifically, the State has alleged that Dr. Mullet violated the State's water quality criteria and illegally approved plans for wastewater disposal systems. Doctor Mullet does not challenge these causes of action in this branch of his motion.

As alleged in the Complaint, the Commissioners entered into a contract with the Health Department/Health District. Under the contract, the Health Department/Health District operated the plants. In fact, the Health Department/Health District completed and submitted the applications for the permits. Dr. Mullet signed the permit applications for the October Hills plant, the Walnut Creek plant and the Mount Hope plant. The Health Department/Health District submitted applications for Permits to Install for Holmes County Treatment Works and Disposal Systems. It is therefore clear that the Health Department/Health District and Dr. Mullet were in charge of the day-to-day operations of the plants.

The Court finds persuasive the decision in *United States v. Brittain.*[12] In this case, the U.S. EPA issued a pollution discharge permit to the city of Enid, Oklahoma. The city's public utilities department had general supervisory authority over the operation of the plant. The United States filed an action against Brittain, the supervisor of the plant, for false statements made on reports to U.S. EPA.

It is interesting to note that Brittain, like the Health Department in this case, argued that he was not a "person" for the purposes of the Federal Clean Water Act. In addition, Brittain raised the defense that he was not a person listed on the discharge permit. The United States Tenth Circuit Court of Appeals clearly held that operators of discharge permits could be prosecuted for violation of the Federal Clean Water Act, even though they were not listed as "persons" in the permit itself. In *Brittain*, the underlying statute prohibiting pollution was the authority for prosecution, not the permit itself.

Accordingly, this Court holds that the State may bring an action against the holder of a permit for violations of the permit and against any operator of a permit for violation of the underlying statute. This holding is in conformance with the legislative intent to give the Attorney General authority to commence prosecutions

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[12] (1991), 931 F.2d 1413.

to prohibit pollution of the waters of this state. There is no indication of legislative intent to insulate operators of plants from liability.

In the third branch of the motion, the Health Department/Health District and Dr. Mullet argue that they are entitled to sovereign immunity for alleged violations of R.C. Chapter 6111.

Defendants rely upon R.C. 2744.01 to 2744.09. These laws limit sovereign immunity in tort actions.

Specifically, R.C. 2744.02(A)(1) provides:

> "For purposes of this chapter the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to a person or property allegedly caused by any act or omission of a political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

The State's action does not seek damages in a civil action for injury, death, or loss to person or property. The State's action seeks an injunction and civil penalties from the defendants for violations of Ohio's water pollution laws.[13]

It has been held that a political subdivision's responsibility to oversee and maintain a sewer system is a duty owed to the general public similar to police or fire protection. The "public duty" doctrine states "that if the duty imposed on a public official is a duty owed to the public, then a failure to perform or adequately perform is a public, not individual, injury and must be redressed, if at all, by some form of

[13] R.C. Chapter 6111.

"public prosecution."[14] An action by the State for failure to maintain and operate a plant and sewer system is a form of public prosecution against the Health Department/ Health District and Dr. Mullet.

The Court notes that a finding of sovereign immunity applied to political subdivisions in their operation and maintenance of wastewater treatment plants would render R.C. Chapter 6111 unenforceable as to any wastewater treatment plan operated by a political subdivision. There is no indication of legislative intent to insulate political subdivisions from actions for violation of R.C. Chapter 6111.

Dr. Mullet also argues that he should be immune from prosecution as a public employee. As previously stated, the State makes no allegations against Dr. Mullet individually for violation of the permits. Rather, the State's claims against Dr. Mullet individually are limited to two causes of action:

1. Violation of the State's water quality criteria[15] and
2. The unauthorized approval and issuance of permits for wastewater discharge systems.

The State alleges that Dr. Mullet's actions violated R.C. Chapter 6111 and were thus outside the scope of his authority as the County Health Commissioner. As a public employee, Dr. Mullet does not have any immunity from suit for actions outside the scope of his authority. Immunity does not extend to conduct forbidden by law.

This Court has previously held that individuals are personally liable for violations of R.C. Chapter 6111.[16] In the case at bar the State alleges that Dr. Mullet as Health Commissioner, had knowledge, approval and control over the

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[14] *Passov v. Paris Development Corp.* (1988), 55 Ohio App. 3d 202, 205.
[15] Ohio Adm. Code 3745-1-04.
[16] See *State of Ohio vs. Holmes Cheese Co. and Ramseyer* (March 16, 1993), Holmes Common Pleas Case No. 92-C-92, unreported. See also, *State, ex. rel. Celebrezze v. Scioto Sanitation, Inc.* (October 23, 1991), Scioto App. 1932, unreported.

operation of the plants. In addition, the State alleges that Dr. Mullet submitted and signed the permit applications. The State further alleges that Dr. Mullet exceeded his authority by approving unauthorized wastewater disposal systems for semi-public facilities. Accordingly, Dr. Mullet may be held personally liable for violations of R.C. 6111.07 and 6111.09..[17]

Accordingly, this Court holds that the doctrine of sovereign immunity does not apply to enforcement actions by the State seeking injunctive relief and civil penalties against political subdivisions and public employees for violations of R.C. Chapter 6111.

In the fourth branch of the motion to dismiss, Defendants argue that the State's claim is time-barred. Defendants rely upon R.C. 2744.04 which sets a two year statute of limitations for an action seeking damages for injury, death, or loss of property.

As noted previously, the State's claims are not tort causes of action. This is an enforcement action for violation of R.C. Chapter 6111. Moreover, the State is not seeking damages for injury, death, or loss of property. The State is requesting an injunction requiring compliance with Ohio law and civil penalties for past violations.

Civil penalties are clearly distinguishable from damages. Damages are designed to compensate an injured party, to make them whole. Civil penalties are a tool used to implement a regulatory program.[18] No statute of limitations on actions brought by the State for violations of R.C. Chapter 6111 are provided in that chapter or any related chapter of the Ohio Revised Code.

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[17] Dr. Mullet also argues that he should be immune from liability because he exercised good faith and is not subject to civil prosecution. As this Court previously held, environmental statutes impose strict liability and good faith is not a defense to a violation of these statutes. *State of Ohio vs. Holmes Cheese Co. and Ramseyer, supra.* See *State, ex. rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St. 3d 151.

[18] *State, ex. rel. Brown v. Howard* (1981), 3 Ohio App. 3d 189.

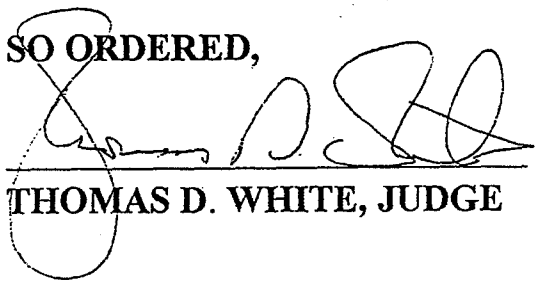
Accordingly, the Court holds that the Complaint is not barred by any statute of limitations.

Order.

For the foregoing reasons, the May 27, 1997 motion by the Health Department/Health District and Dr. Mullet is considered and denied and the State's Motion to Strike of July 31, 1997, is considered and denied.

The State is granted leave to file within fourteen days of this order an amended complaint substituting the Holmes County General Health District for the Holmes County Health Department.

SO ORDERED,



THOMAS D. WHITE, JUDGE

cc: All counsel

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